

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No.
)	3:19-cr-00458-MO
v.)	
)	July 14, 2021
JOHN L. JACKSON,)	
)	Portland, Oregon
Defendant.)	

TRANSCRIPT OF PROCEEDINGS

(Motion to Compel)

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT JUDGE

COURT REPORTER:

Kellie M. Humiston, RMR, CRR
(503) 326-8186
Kellie_Humiston@ord.uscourts.gov

A P P E A R A N C E S

FOR THE PLAINTIFF:

UNITED STATES ATTORNEY'S OFFICE
By: Kelly Alexandre Zusman
1000 SW Third Avenue
Suite 600
Portland, OR 97204

FOR THE PLAINTIFF:

UNITED STATES ATTORNEY'S OFFICE
By: Pamela Paaso
1000 SW Third Avenue
Suite 600
Portland, OR 97204

FOR THE DEFENDANT:

HOEVET OLSON HOWES
By: Celia A. Howes
1000 SW Broadway
Suite 1740
Portland, OR 97205

FOR THE DEFENDANT:

HOEVET OLSON HOWES
By: Per C. Olson
1000 SW Broadway
Suite 1740
Portland, OR 97205

(July 14, 2021, 10:40 a.m.)

P R O C E E D I N G S

MS. ZUSMAN: Your Honor, Kelly Zusman appearing on behalf of the United States. This is United States v. Jackson, Criminal No. 3:19-cr-00458-MO. Appearing today with Pam Paaso.

Defendant is here represented by Miss Howse, and we're here on defendant's motion to compel and to dismiss.

THE COURT: Thank you. Good morning.

MS. HOWES: Good morning, Your Honor. We are here on an oral argument on the defendant's motion to compel. It is my understanding that oral argument on defendant's motions to dismiss is scheduled for August 30th. I am prepared to discuss the standards that apply to those motions to the extent that they provide context for the Court's decisions here today, but our focus is on Mr. Jackson's requests for discovery.

THE COURT: Thank you. You can go ahead and be seated. And thank you for your habit of standing, but I'm going to ask you to stay seated during the hearing so I can hear you a little better through the Plexiglass.

So that's right. The issues are intertwined, but today we are only talking about the motion to compel. It'll be necessary to understand the motions to dismiss, to understand what's being sought, why it's being sought, and why it might be relevant, but I'm not going to resolve the motions to dismiss

1 today.

2 Let me give you some tentative thoughts that I think
3 might help get us started, and then I'll start with oral
4 argument.

5 Does anyone have the intention of putting on evidence
6 other than argument for this case, for this hearing today?

7 MS. HOWES: Not today for the defense.

8 MS. ZUSMAN: We do not, Your Honor.

9 THE COURT: All right. So Mr. Jackson has filed
10 several motions to dismiss, specifically to -- that it was a
11 violation of the Speedy Trial Act to dismiss -- to charge,
12 dismiss, and then recharge Count -- we'll call it Count 5;
13 second, that there -- that it is an unconstitutional delay
14 separate from the Speedy Trial Act issue to bring the charges in
15 the superseding indictment, that that whole thing took too long
16 and was for improper reasons; and third, that under *Youngblood*,
17 that something should happen, dismissal or perhaps other
18 remedies, for the failure to preserve or acquire the cellphone
19 records from MV5.

20 Those are your three motions?

21 MS. HOWES: Yes.

22 THE COURT: What I'd like to do is make sure that I
23 have the governing methodology right first. So the simplest one,
24 just -- not for its answer, but for its methodology, might be the
25 cellphone records, because there is a methodology laid out in

1 *Arizona v. Youngblood*, and that methodology is essentially two
2 parts: one -- so I'm going to assume, I think the government
3 hasn't disagreed, I don't think either side has disagreed that
4 the governing standard is from *Youngblood* even though
5 *Youngblood's* about failure to preserve evidence, and here it's --
6 I suppose there's sort of an inferential way it could be thought
7 of failure to preserve, but it's really the failure to allow for
8 the opportunity for the defense to acquire, for the government to
9 acquire.

10 Does anybody disagree that despite that factual
11 difference, the general standard for *Youngblood* is the governing
12 standard here?

13 MS. HOWES: No disagreement.

14 MS. ZUSMAN: No, Your Honor.

15 THE COURT: Two parts to that standard: one is some
16 sort of bad faith in the failure; and two, that -- some idea that
17 it could have affected the outcome. So that's -- in fact, I
18 think what I'll do is just break this up into pieces and start
19 with that. What I said, though, I'd like to do is get the
20 methodology right. I think that's the methodology. The burden
21 ends up initially at least being on the defendant to propound
22 something that suggests bad faith at least to go forward and to
23 explain how the evidence could affect the outcome here.

24 What have you got on bad faith for failure to acquire
25 these records? If you'd remain seated, I'd appreciate it.

1 MS. HOWES: I'm sorry. I forgot.

2 THE COURT: That's fine.

3 MS. HOWES: I will answer the question of the Court,
4 but I will also suggest that because the standards and the
5 methodology for the motions to dismiss based on unconstitutional
6 delay and with regard to the Rule 48 dismissal order are lower
7 than *Youngblood* and because the evidence I'm seeking is also
8 relevant to those motions, I believe my threshold for acquiring
9 discovery of the materials and information I seek is lower than
10 that set forth in *Youngblood*. And so you're right that
11 *Youngblood* requires bad faith.

12 THE COURT: Let's start with this one. And, actually,
13 before I finish on methodology, the one question is, I've
14 outlined a methodology for resolving your motion to dismiss, but
15 I haven't outlined the methodology for resolving your motion to
16 compel, which may have something else I need to think about in
17 terms of granting it even on just the bare *Youngblood* issue in
18 your third motion to dismiss.

19 Is there something else I should think about in terms
20 of what the right test is, not for your motion to dismiss, but
21 for your motion to compel?

22 MS. HOWES: Well, the -- all of the items that we seek,
23 I believe, require production under *Brady* and its progeny. And
24 the standard, the articulation of *Brady* that I think is most
25 helpful to our cause is that set forth by the Supreme Court in

1 *Kyles v. Whitley*, which says that *Brady* requires that the
2 defendant receive the information that is necessary to instill
3 confidence that he has received a fair procedure here, a fair
4 outcome at his dispositive motions, and a fair outcome at trial.

5 And so I think --

6 THE COURT: That's a little -- that's a little tricky
7 to apply for a *Youngblood* case, though, right, because by
8 definition, a motion under *Youngblood* is a motion for stuff that
9 cannot be produced anymore. So there aren't cellphone -- I mean,
10 it would be simple if I just tell them to produce them, but now
11 we're dealing with the question what to do about the fact that
12 they no longer exist.

13 MS. HOWES: Well, except that I think that the question
14 for the Court under the *Youngblood* analysis is the extent of the
15 government's culpability for the loss of evidence, and so I
16 should be entitled to the determination of that issue to discover
17 the information relevant to that question.

18 THE COURT: In other words, that although the actual
19 cellphone records can't be produced, you want any evidence
20 that -- you want for production any evidence under *Brady* at a
21 minimum that might suggest bad reasons for not acquiring this
22 evidence in the first place?

23 MS. HOWES: Correct.

24 THE COURT: In other words, internal documents.

25 MS. HOWES: That's right.

1 THE COURT: And you agree that what *Brady* would require
2 for that, then, is that the government, at a minimum, look for
3 and produce anything in its internal files that would suggest an
4 inadequate rationale for not acquiring the cellphone records?

5 MS. HOWES: That's right. Specifically I'm asking for
6 internal communications within the U.S. Attorney's Office and
7 with their investigation team that is -- that are specific to
8 investigatory leads and determinations as to whether to interact
9 with MV5 over the course of the government's investigation, and
10 those same materials as relevant to the government's decision to
11 file the motion to dismiss Count 6 with respect to the previous
12 indictment when it did.

13 THE COURT: I know those all overlap, but I want to
14 stick with the cellphone records for just a second.

15 MS. HOWES: Sure.

16 THE COURT: And I'm not trying to suggest that I won't
17 eventually hear how they all overlap, but let's stick with this
18 one just for an initial piece.

19 So what you want -- in a typical case, then, I would
20 verify if the government agrees that that's a *Brady* obligation it
21 has and send them out to take a look at their internal files and
22 produce anything that fits this *Brady* obligation.

23 You're today asking for something more than that,
24 aren't you? You're suggesting, or at least it seems you're
25 suggesting, that I should skip that step because of the

1 government's inadequate performance under *Brady* and just have the
2 whole file turned over to you, or am I wrong about that?

3 MS. HOWES: You're right about that. We have
4 essentially lost faith that the government is parsing through its
5 information with the same lens that we would. And we have
6 observed over the course of this case that the government has
7 made different judgment calls as to certain evidence than we
8 would make. And I would like the Court to relieve the government
9 of its burden to go through that process, and give it to us.

10 THE COURT: All right. Thank you.

11 So that's two parts. The first part is do you agree
12 that you have an obligation to look at your internal files under
13 *Brady* to see whether there is evidence that would support a
14 defense motion under *Youngblood*, that is, a defense motion that
15 would say that you failed to acquire the cellphone records for --
16 in bad faith; that if there were such in your internal files, do
17 you agree you should look for and produce it if it exists under
18 *Brady*.

19 MS. ZUSMAN: Yes. And let me answer this carefully.
20 First, I disagree with the proposition that *Brady* as a doctrine
21 necessarily applies to a motion to dismiss, particularly insofar
22 as it relates to our own internal charging decisions. And for
23 that, I would refer the Court to the *Armstrong* case from the
24 Supreme Court, and that's 517 U.S. 456, and that was from 1996,
25 where the Supreme Court recognized that internal charging is of a

1 different species, if you will, than other discovery. It really
2 doesn't relate to the merits of the case so much as how the
3 government does its business. And for that, it requires more
4 than simply, "We don't trust the government and we want that
5 information."

6 THE COURT: I'll pause you there for just a moment.
7 You advanced two ideas, one general and one specific. The
8 general one is that you're not sure that *Brady* applies to motions
9 to dismiss generally speaking, not just ones that get at internal
10 documents with motions to dismiss.

11 Is that specific to motions to dismiss? Do you agree
12 it applies to some pretrial motions?

13 MS. ZUSMAN: I absolutely agree that the Ninth Circuit
14 has held it applies to motions to suppress.

15 THE COURT: How do you distinguish *Brady*'s application
16 to motions to suppress from, say, motions for unconstitutional
17 delay in indictment?

18 MS. ZUSMAN: Right. And, again, I'm carving out here
19 specifically motions that address the government's charging
20 decisions, and so motions to dismiss that are premised on the
21 idea that we are -- we shouldn't be bringing the charge at all,
22 that we have somehow -- were flawed in bringing the case
23 altogether, whether it's for an unconstitutional reason, a
24 selective prosecution reason, what have you.

25 THE COURT: Why would *Brady* apply to motions to

1 suppress but not apply to the setting you're carving out?

2 MS. ZUSMAN: Because *Brady* -- really the heart of *Brady*
3 is exculpatory information, which means Mr. Jackson is not
4 guilty, and that can be information that directly undermines an
5 element of the charge or that bolsters an aspect of a defense,
6 and it also has been extended to include impeaching information
7 for government witnesses.

8 It has been classically treated as a trial right. The
9 Ninth Circuit has extended that to motions to suppress, which
10 involve evidentiary issues, that require often witnesses to --

11 THE COURT: I guess I read that is whatever the core
12 may once have been of *Brady*, it now has another core in the sense
13 that it's a holding I must follow that may have nothing to do
14 with guilt or innocence, or it may have something to do with a
15 prophylactic measure under *Miranda*, for example, or something
16 like that --

17 MS. ZUSMAN: Correct.

18 THE COURT: -- and yet *Brady* applies to anything the
19 government has in its possession that might support the
20 defendant's motion to suppress, right?

21 MS. ZUSMAN: To support the motion -- that's correct.
22 But, again --

23 THE COURT: I mean, if the reason that you would treat
24 motions to dismiss indictments different than motions to suppress
25 is that the core of *Brady* is that it's a trial right about guilt

1 or innocence, then you fail to explain why I should care about
2 motions to suppress, but I have to.

3 MS. ZUSMAN: Right. And, again, I'm getting a little
4 far afield in terms of where I thought we were headed, but
5 motions to suppress really relate to what evidence can come in at
6 trial. So I see it as really a corollary to the trial right
7 insofar as it relates to what evidence is going to be admissible
8 at trial.

9 The motions to dismiss, and several of the motions to
10 dismiss that have been filed here, really are directed against,
11 "Government, why have you brought this case altogether," and for
12 that, I think just slapping *Brady* onto it is an ill fit in large
13 part because the Supreme Court in *Armstrong* recognized that
14 there's another constitutional principle at play, and that's
15 separation of powers.

16 THE COURT: So the impact is, to take it to its
17 application in this case, of your argument would be that if in
18 your file there were internal documents supporting the idea that
19 a TFO deliberately didn't acquire cellphone records out of a
20 concern that it might be bad for your case until the cellphone
21 records had been deleted off the system, and then moved forward
22 afterwards, that you would have no *Brady* obligation or any other
23 obligation to disclose that evidence. That's -- that's the
24 impact of this case, right?

25 MS. ZUSMAN: No. And again to be clear, my position

1 would be that if we possessed information that Detective Lee
2 deliberately avoided contacting Minor Victim 5 and he did so
3 because he knew the clock was running on her cellphone
4 geolocation data, I think that does at least potentially raise
5 due process concerns, and I think none of -- none of us would
6 have any compunction about turning over that information if we
7 had it.

8 Now, I understand Mr. Jackson's motion, however, to be
9 broader than that. He's not asking us to just produce
10 information that either Detective Lee or any other member of the
11 prosecution team deliberately avoided reaching out to MV5 in
12 order to lose this geolocation information, because if that were
13 the essence of the motion, then I'd have no trouble standing here
14 and saying we don't have that. I don't have that smoking gun.

15 But her motion says, we don't trust the government, so
16 you should turn over all of your information, all of your
17 e-mails, every communication.

18 THE COURT: So I can take this in two pieces, which is
19 what her argument was. The first piece is is there any
20 obligation -- we started this by first that there is an
21 obligation to look for *Brady* by the government, and then, second,
22 that if there is such an obligation, that the defense mistrusts
23 the government's ability to do that right, so skip the step I'd
24 normally take.

25 So my first question was simply, do you agree that

1 there is this obligation?

2 My next question is going to be, do you agree I should
3 skip over the government out of a failure of performance and just
4 turn it over to some other step?

5 I take it that your answer to the first question,
6 although I thought it was going a different direction, is yes,
7 either under *Brady* or under the due process clause, that the kind
8 of information that we've discussed, something that would
9 actually support a motion under *Youngblood*, support the idea of
10 bad faith failure to acquire cellphone records, you feel that if
11 you saw it or looked for it and saw it, you'd have to produce it,
12 correct?

13 MS. ZUSMAN: I think that's correct, yes.

14 THE COURT: And that's true even if the information
15 wasn't in external evidence, but it's in internal communications
16 among the prosecution team, correct?

17 MS. ZUSMAN: Correct.

18 THE COURT: All right. So with that, normally what I
19 would do is say either, "Have you done the search that the
20 obligation would require of you," or "Go and do it and tell me
21 what you learn."

22 The second argument is that the government's
23 performance so far under *Brady*, according to Mr. Jackson, has
24 been inadequate enough that I ought to skip that step and take
25 some other action. What's your response to that?

1 MS. ZUSMAN: So my response to the first part of your
2 question is that we have spoken with Detective Lee, who I think
3 is our operative player here, and he has through his declaration
4 told you affirmatively that there was no intentional delay in
5 contacting Minor Victim 5; that, in fact, he knew she was
6 skittish; he was concerned about approaching her; he knew that
7 she had evaded talking to law enforcement in the past; and that
8 based on his extensive experience, he knows that sex trafficking
9 victims, particularly young girls like MV5, are difficult
10 witnesses at best, and that he didn't want to push her too fast,
11 too hard, too quickly. And that's really the reason that he took
12 the time that he did in order to find her and then eventually
13 reach out to her. It had nothing to do with her geolocation
14 data.

15 I think it's also -- when you're looking at that, it's
16 important to note that he didn't know that she was going to say
17 that Jackson took her phone until after that one-year
18 preservation period expired. His meeting with her was in October
19 of 2019. And as Mr. Jackson has told you in their briefing
20 material, the expiration dates for that geolocation data was
21 September 8th of 2019, so almost a month before.

22 THE COURT: Well, I understand that that's the
23 government's position about what has happened with the failure to
24 acquire cellphone data.

25 The argument you're facing, not to put too fine a point

1 on it, is that there -- that that process of the government
2 looking for *Brady* and then announcing that it has or has not
3 found anything *Brady* and has a legitimate explanation that should
4 control is what normally happens most of the time, but that in
5 this case, the government has forfeited that level of trust, at
6 least vis-a-vis the defense, and that I should intervene in such
7 a way that doesn't require the defense to simply accept that
8 explanation of what the files might show.

9 What's your response to that?

10 MS. ZUSMAN: And as I understand it, the defense has
11 two primary complaints with how the government has handled what
12 it considers *Brady*. The first is Priscilla Seaborg's e-mail, and
13 it -- regarding the meeting with her client and before, and it
14 took us nine months to produce that.

15 The second is the Keonte Scott proffer. That took
16 place in February of 2020. We did not receive the report of that
17 interview from Detective Lee until the first part of January
18 2021, so there was an 11-month delay in producing the report. As
19 soon as we received it, we turned it around and got it to the
20 defense within a couple of weeks.

21 So if I understand it correctly, those are their --
22 their two primary data points in urging you to say, "I don't
23 trust the government anymore. I've got to let you go in there
24 and rummage through all of their files."

25 With those two points, I will say that I agree with

1 Miss Howse that those are exculpatory. I agree that they should
2 have been turned over more promptly than they were.

3 As a result of really the defense bringing this to our
4 office's attention, that's what prompted us to do a complete
5 top-to-bottom audit of the discovery in this case.

6 We now, as of last month, have produced 11 volumes of
7 discovery, and those two items that she mentions have been
8 produced, and we're still 5 months away from trial.

9 So that's by -- let me -- if I can sum it up this way:
10 I recognize that we have not been as quick in producing this
11 information as we should have been. We have corrected it. We
12 have self-corrected, and therefore, obviated the need for either
13 the Court or the defense to step into our shoes and go through
14 our own internal files.

15 THE COURT: Thank you very much.

16 Your response.

17 MS. HOWES: To all of it or just that last point?

18 THE COURT: Well, we're in agreement that there's a
19 *Brady* obligation to disclose what I'll use as a shorthand, bad
20 faith information that might be found even in internal documents.

21 MS. HOWES: Okay.

22 THE COURT: And the government's answer to whether that
23 exists or not, the normal pathway for handling such things is
24 that it has done a careful look, including recently, and there is
25 nothing that would support a bad faith showing under *Youngblood*.

1 And then the last step is the only one you need to
2 respond to, because the rest we're agreed upon, and that is, has
3 the government's overarching performance under *Brady* meant that
4 you're entitled not to be forced to rely on the government's
5 review and explanation about what is or isn't in the file. So
6 the last part.

7 MS. HOWES: To that question, we are not yet satisfied
8 that the government has regained our trust in culling through the
9 relevant materials and information to answer our requests and our
10 questions directly, specifically, and thoroughly.

11 THE COURT: Is that -- is the mistrust you've expressed
12 grounded in those two data points or is there more than that?

13 MS. HOWES: There -- those two data points, plus what I
14 perceive to be some red herrings buried in their response to our
15 motion to compel. The government -- the answers the government
16 has given the Court in its response with respect to the
17 cellphone, I find misleading. And the complaints we raised
18 regarding the loss of the cellphone, the government answers those
19 concerns by referring to a cellphone that was used and destroyed
20 weeks before MV5 ever came into contact with Mr. Jackson.

21 In my review of the materials that have been produced,
22 I have yet to see a report where the government is asking MV5
23 about the relevant telephone.

24 The government's answers as to other points in the
25 response, I find equally as concerning and disappointing, but

1 they're not relevant to the question about the cellphone
2 evidence.

3 I think because we're talking about the cellphone
4 evidence and because their answer to that, I -- and the response,
5 I found, was misleading, my concerns are not alleviated, they
6 persist, and that is -- in compilation with other representations
7 the government has made over the course of this case, including
8 oral representations that were memorialized in e-mails to me
9 characterizing the nature of the information that they had
10 through Keonte Scott's proffer and through MV4, as not helpful to
11 Mr. Jackson.

12 Now, whether they had a piece of paper in their hand or
13 not to provide to me is a different question. They had that
14 information in hand, whether it be written down or not, and the
15 *Brady* requirements extend to information the government knows,
16 not just written reports.

17 THE COURT: All right. Thank you.

18 I want to move on to the other motion to dismiss, and
19 the one grounded in the charge, dismissal, and recharge, which is
20 said to be, or at least labeled as a violation of the Speedy
21 Trial Act.

22 So tell me more specifically in what way you view that
23 scenario as violating the Speedy Trial Act? I think I understand
24 your third motion better. That's an unconstitutional delay in
25 bringing the last indictment, but this one, I guess the Rule 48

1 question, how is that a violation of the Speedy Trial Act?

2 MS. HOWES: It -- the argument is best made in
3 understanding the context in which the government dismissed -- or
4 moved the Court to dismiss the first indictment.

5 THE COURT: So I understand your argument that that was
6 improper, that there weren't actually adequate grounds at the
7 time the motion was made to justify granting it; that had they
8 been pressed, they wouldn't have had support for the assertions
9 they made seeking a motion to dismiss without prejudice.

10 If that's all that had happened, what would the remedy
11 for that be? Someone got a charge dismissed without prejudice,
12 you later learned that that was inadequate, therefore what?

13 MS. HOWES: Well, the *Wallace* case that we cited in our
14 reply tells the Court that if the Court learns after granting a
15 government's motion to dismiss without prejudice that the
16 government's basis for that motion was a sham, the Court can
17 revisit its decision and enter that order with prejudice.

18 THE COURT: All right. So then what does happen, of
19 course, is charge, dismissal, recharge. And in what way does
20 that violate the Speedy Trial Act?

21 MS. HOWES: The speedy trial clock is tolled in between
22 the dismissal and the recharge. And I -- I honestly --

23 THE COURT: That's not my question. If it's not
24 tolled, is there sort of a numerical violation to the Speedy
25 Trial Act?

1 MS. HOWES: I believe I set forth an argument for
2 numerical violation. So there were a certain number of days that
3 had passed leading up until the dismissal of the case. It
4 appeared as if the Court was about to grant Mr. Jackson his
5 request for a speedy trial, case was dismissed, there was some
6 lapse of time, a matter of weeks, perhaps, and then there was a
7 recharge.

8 And in the span of that time, up until Mr. Jackson
9 appeared, I think he made his first appearance on the case, the
10 clock had tolled and there was --

11 THE COURT: The clock had tolled or run?

12 MS. HOWES: Run. Excuse me. Run.

13 THE COURT: That's in your argument. I wasn't clear
14 from your briefing if you had that numerical argument. Is
15 that --

16 MS. HOWES: I believe I did have a numerical argument.
17 And I can pull my briefing up here.

18 THE COURT: Let's just come back to that.

19 MS. HOWES: Okay.

20 THE COURT: So that is your argument and that's -- and
21 therefore, the remedy you're seeking for the -- for the improper
22 dismissal without prejudice is dismissal under the Speedy Trial
23 Act?

24 MS. HOWES: Correct. There are two requests I'm making
25 under that motion. I apologize for confusing the Court. But one

1 argument is that the Court can revisit its order dismissing
2 without prejudice Count 6 of the original indictment based on
3 what appeared to be misrepresentations to the Court about the
4 reasons for its motion.

5 The second argument --

6 THE COURT: Well, you know, it's not a day to mince
7 words. So you contend they are misrepresentations, right?

8 MS. HOWSE: Fair enough. Yes. I don't have
9 information that suggests those were not misrepresentations, so
10 let's just call them misrepresentations.

11 THE COURT: Well, certainly you contend they're
12 factually incorrect.

13 MS. HOWES: Yes.

14 THE COURT: All right. Both of them?

15 MS. HOWES: Both of them.

16 THE COURT: All right. So now we're not here on your
17 motion to dismiss for speedy trial violation, we're here on a
18 motion to compel.

19 MS. HOWES: Correct.

20 THE COURT: And you appear to have, and have written
21 up, the argument based on information that you used to
22 demonstrate in your view that the assertions are factually
23 incorrect and couldn't have justified a motion to dismiss without
24 prejudice.

25 MS. HOWES: Correct.

1 THE COURT: What more are you seeking by way of a
2 motion to compel to support that argument, the speedy trial
3 argument?

4 MS. HOWES: Well, perhaps you're seeing what I am,
5 which is I believe I have sufficient evidence to argue my motion
6 to dismiss based on the apparent misrepresentations in the
7 government's pleading.

8 THE COURT: Your contention -- your argument, at least
9 as you briefed it, doesn't require on this argument, the speedy
10 trial argument, any showing of bad faith, right?

11 MS. HOWES: My argument on the speedy trial violation,
12 I do not believe, requires any showing of bad faith. It's purely
13 a --

14 THE COURT: The time ran, it ran, and you don't have to
15 show bad faith.

16 MS. HOWES: The time elapsed.

17 THE COURT: It may have something to do with the
18 remedy, but not the violation.

19 MS. HOWES: And I think here I've cited a case, Your
20 Honor, the *United States v. Biggs*: Based on the facts now known
21 to defendant and the court about the reasons for the delay, the
22 court can make a finding that because the delay was not motivated
23 by proper consideration, the time should have been excluded from
24 the Speedy Trial Act calculation.

25 So I think there is some consideration there that the

1 Court can evaluate the government's reasons for the delay and
2 determine that there -- that there were proper reasons to exclude
3 the --

4 THE COURT: So the same with the Rule 48 problem, that
5 you don't -- your argument, as I understand it, doesn't hinge on
6 showing the government willfully misrepresented its underpinnings
7 for the motion. If they were just sloppy about it and wrong,
8 then you have the same argument, don't you?

9 MS. HOWES: That's correct.

10 THE COURT: All right. Thank you.

11 I first want to understand, even though we're not
12 resolving it today, what the governing standard is for the speedy
13 trial motion, because that will tell me what's relevant to be
14 produced or not.

15 So the argument is, first of all, that -- that if
16 Miss Howse is right and the initial motion to dismiss without
17 prejudice was founded on erroneous assertions, assertions that
18 couldn't have been backed up on the day they were made, that that
19 results in no tolling of the time between the granting of that
20 motion and his appearance on the second indictment.

21 Do you agree or disagree?

22 MS. ZUSMAN: And I wasn't prepared to address the
23 Speedy Trial Act motion. I think our response to that is due on
24 the 20th, Your Honor.

25 THE COURT: The reason I'm bringing it up now is that I

1 need to decide what needs to be produced to argue that motion,
2 and that has to be decided today.

3 MS. ZUSMAN: It -- I guess in terms of focusing on the
4 reasons for the initial dismissal, it's my understanding that
5 that requires a showing of not just making a mistake, but bad
6 faith. And the case example comes from the prosecutor who
7 doesn't like the looks of the jury, and moves to dismiss. And
8 that's offered as -- that's a bad faith reason for dismissing an
9 indictment.

10 Now, the reasons that we gave on September 28th of 2019
11 for dismissing the indictment, and I understand that Mr. Jackson
12 has really parsed those comments, but I would describe that as we
13 have an ongoing investigation. And if you just focus in on what
14 was happening right around the time of that dismissal, it was the
15 day before September 26th that Detective Hollan and Detective Lee
16 had arranged to meet with MV5. They had --

17 THE COURT: I'm going to stop you there. I'm aware of
18 the background. And I don't view it as parsing the statements.
19 I view it as just analyzing them.

20 But first, you know, not to beat the same refrain over
21 and over again, but I want to make sure I understand what the
22 governing standard is for, as you put it in your brief, to upset
23 a court's Rule 48(a) dismissal without prejudice, you contend
24 that the defendant must overcome the presumption that the
25 government acted in good faith. And that's been the subject of a

1 counterargument in a reply brief. You cite *Wallace*.

2 What's -- I guess I'm asking, what's your response to
3 the reply brief on this subject?

4 MS. ZUSMAN: Yes. And I understand that *Wallace* refers
5 to a presumption, but it doesn't include that specific language.
6 But there is another Ninth Circuit case, and I'm quoting, it says
7 that when the Court considers --

8 THE COURT: What case?

9 MS. ZUSMAN: So the case is *United States v. Welborn*,
10 that's 849 F2d 980 at 983, it's Ninth Circuit, 1988, and it says
11 when a Court considers this issue -- which is the dismissal
12 without prejudice and whether or not that can stand -- it must
13 begin with a presumption that the prosecutor acted in good faith.

14 So it's a correct proposition, it's just that specific
15 language is not found in *Wallace*, but it is found in *Welborn*.

16 THE COURT: What are we to make of the statements in
17 support of this motion to dismiss Count 6 by the government:
18 first, the statement that it had recently identified additional
19 criminal conduct by Mr. Jackson? First, was that correct?

20 MS. ZUSMAN: That was -- it was re- -- it depends on
21 how broadly you define "recently." We learned from --

22 THE COURT: "Recently" meaning not subsequent to the
23 date that statement was made.

24 MS. ZUSMAN: That's correct. What happened was we
25 learned from Minor Victim 4 in February, so about 7 months

1 earlier, that there was another victim, and that was MV5.

2 Now, it took a couple of months to identify MV5 and
3 then it took a couple of more months to identify who Nelly was,
4 but that's the information that we're talking about that's
5 developing between February and September of that year.

6 THE COURT: Well, did that information support
7 additional criminal conduct by Mr. Jackson as opposed to
8 Miss Petrovic?

9 MS. ZUSMAN: It did.

10 THE COURT: MV4 is saying that Mr. Jackson is involved
11 in criminal activity regarding MV5?

12 MS. ZUSMAN: Yes.

13 THE COURT: And so you're contending that in those
14 earlier months, that supports the statement made on the day --
15 well, in support of the Rule 48(a) motions.

16 MS. ZUSMAN: Yes.

17 THE COURT: And you agree, I assume, that what you
18 learned subsequent to the filing of that motion would not support
19 that statement.

20 MS. ZUSMAN: Correct.

21 THE COURT: Same question with regard to proceeding as
22 opposed to dismissing without prejudice being operationally
23 risky. What's the support for that?

24 MS. ZUSMAN: The support for that is that, as I
25 understand it, in September, we were just about a month out from

1 trial, and that was the trial involving Keonte Scott as the
2 primary. I think our primary concern at that time was that we
3 were still gathering new information about MV5. We just learned
4 the day before that they had contacted her, that they were going
5 to go out and interview her, and that we were in a position where
6 we had a trial date in a month and we were still investigating.

7 So referring to this as being "operationally risky,"
8 it's that gathering information that we know we need to produce,
9 and we only have a month before trial. So that's my
10 understanding of what that statement meant.

11 THE COURT: I thought it was advertised as meaning that
12 it would result in threats to MV5.

13 MS. ZUSMAN: Well, there was that concern as well. And
14 as I understand it, MV5 also was contacted by associates of
15 Mr. Jackson.

16 THE COURT: All right. Thank you. Well, I should ask,
17 do you agree that if the Rule 48(a) motion was made in bad faith,
18 that the consequence is that there's a violation of the Speedy
19 Trial Act?

20 MS. ZUSMAN: I'm not prepared to answer that -- the
21 interplay between the Rule 48 issue and the Speedy Trial Act
22 issue if -- but if there were --

23 THE COURT: In terms of the production -- and that's
24 the only thing we're concerned about today -- you contend that
25 the standard for answering this question is bad faith, therefore,

1 what's your position on whether evidence of bad faith in the
2 seeking of a Rule 48(a) motion to dismiss without prejudice is or
3 isn't producible and relevant to the motion we're going to hear
4 on August 30th?

5 MS. ZUSMAN: If your question is if we had --

6 THE COURT: I'm trying to focus not on the -- it's fair
7 enough I'm not asking you to have an argument on the motion to
8 dismiss. I'm really only trying to get at what must be produced
9 in advance of that hearing.

10 So you contend that the standard that would need to be
11 met is bad faith. So, therefore, what's your position on whether
12 evidence of bad faith on the 48(a) question must be produced
13 before that hearing to the defense? "Yes" or "no." I'm not -- I
14 don't need a one-word answer, but is your position it should or
15 should not be produced?

16 MS. ZUSMAN: I'm sorry. Apologies.

17 So if I understand your question -- and so if we had
18 evidence, internal or external, that we moved to dismiss the
19 original indictment in bad faith, would I have to produce it?

20 THE COURT: Yes.

21 MS. ZUSMAN: If that's your question, then, again,
22 under a broad reading of the due process clause, I'd say probably
23 yes.

24 My other answer, though, is, of course, we don't have
25 that. We don't have any evidence of bad faith reasons for

1 dismissal.

2 This case is one that simply grew --

3 THE COURT: No, no. I don't need you to argue bad
4 faith yet.

5 MS. ZUSMAN: Okay.

6 THE COURT: I'm not going to make any decision about
7 bad faith today at all. I just need to figure out what needs to
8 be produced.

9 But you have different views about the government's
10 legal standard. I don't also have to resolve that today. I
11 haven't heard anything that -- well, you tell me whether -- what
12 you think -- in light of the arguments we've heard, what you
13 think should be produced beyond what you already know to support
14 their Speedy Trial Act motion.

15 MS. HOWES: Well, having heard for the first time just
16 now new facts that the government is relying on to support their
17 representations made in its motion to dismiss --

18 THE COURT: What did you hear that was new? I thought
19 I'd read everything that she said.

20 MS. HOWES: What I heard just now was that the new --
21 recent discovery of new evidence was in reference to the
22 developing identification of MV5, which took a couple of months,
23 and the developing identification of Mr. Jackson, which took a
24 couple of more months.

25 THE COURT: Well, we knew the phrase was there, and you

1 thought it referenced something that happened later, and they're
2 saying it references something that happened earlier. On
3 August 30th, we can debate who's right about that.

4 MS. HOWES: Well, I mean --

5 THE COURT: But none of those facts are new.

6 MS. HOWES: Well, but they're new in that it didn't
7 take a couple of months to do either of those things, that it
8 took a couple of weeks for the government to identify MV5. And I
9 can refer to the affidavit of Yonsoo Lee on that point, that he
10 had identified her in early February and that they had obviously
11 identified Mr. Jackson prior to his June indictment. So that was
12 certainly nothing new between his indictment and the argument
13 that the government was making.

14 MS. ZUSMAN: Your Honor, if I might just interject. I
15 agree with her on both timing points. So it was a couple of
16 weeks before we identified MV5 and I believe it was -- I do think
17 it was a couple of months before we identified Jackson, but it's
18 all part of what we were learning.

19 THE COURT: Well, I understood your argument to be such
20 that the delays meant that you learned things after you
21 originally indicted him that would support something else
22 happening, further investigation.

23 If you learned all of it before you originally indicted
24 him, then after that original indictment, it would be tough to
25 rely on that to say, "We've recently learned additional

1 information." The clear implication of that is, "since we last
2 indicted him."

3 Is any of this in your argument --

4 MS. ZUSMAN: Yes. And I apologize.

5 THE COURT: -- something you learned after the first
6 indictment?

7 MS. ZUSMAN: If we're focusing on after the first
8 indictment before the motion to dismiss, that would be finding
9 MV5 and setting up the interview with her.

10 THE COURT: All right. I want to turn to your third
11 argument. So your contention is unconstitutional delay not
12 grounded in a technical violation of the Speedy Trial Act, but
13 unconstitutional delay across the whole span of initially
14 starting the case through the second indictment.

15 MS. HOWES: That's right. And there are different
16 standards that apply when considering pre-indictment delay versus
17 post-indictment delay.

18 THE COURT: And you're alleging post-indictment?

19 MS. HOWES: I'm alleging both.

20 THE COURT: Well, you're alleging both. Yeah. You're
21 alleging both, before the first indictment and after the first
22 indictment.

23 MS. HOWES: That's right.

24 THE COURT: I think I know the governing standards.
25 And you're relying essentially on what you view as knowing what

1 they needed to know and not moving on it for the post-indictment
2 delay, right?

3 MS. HOWES: That is right. And as I read the *Barker*
4 standard for post-indictment delay, I don't even need to show
5 prejudice, and that argument can be based merely on government
6 negligence. So I don't need to show government bad faith there.

7 THE COURT: So in light of that position -- again,
8 we're just here today on your motion to compel -- what else do
9 you think you need to argue that motion on the 30th?

10 MS. HOWES: Well, I think that the arguments -- or
11 sorry. The discovery of internal communications about what steps
12 were taken with respect to MV5's interview, locating her, and
13 determinations as to what steps need to be taken as to securing
14 her cellphone evidence are all relevant to that, because the
15 Court's task is to determine, again, the degree of the
16 government's responsibility for the delay and the degree of
17 prejudice. Those are factors that play with one another.

18 And so if there is actual prejudice that the government
19 caused through negligent conduct, that might weigh in favor of a
20 dismissal, or if there's no prejudice but the government acted
21 egregiously or in bad faith, that also might warrant dismissal.

22 So I think in order for the Court to make an
23 intelligent decision about how to balance those factors, the
24 Court and the defense ought to have the information necessary to
25 consider the government's responsibility for the delay and the

1 attendant loss of evidence.

2 THE COURT: Thank you.

3 I'm going to short-circuit this a little bit. I am
4 going to order the government to produce to the Court for
5 in camera review its file in this case, or certainly a copy of
6 its file. Electronic version will be fine. You don't have to
7 copy it all off. And I will undertake an independent review in
8 light of my understanding of what the government -- excuse me,
9 the defense needs to argue its motions on August 30th.

10 They're interrelated, and so I'm not going to parse out
11 one versus the other for production to me. In other words, one
12 of them standing alone might require only a few files, but
13 they're all interrelated enough that I'm just going to ask the
14 entire case file to be forwarded.

15 For starters today, of course, my only interest is what
16 needs to be produced in order to adequately handle for all sides
17 the August 30th hearing. So I need it produced quickly so that I
18 can review it quickly so they can be produced in time to prepare
19 for that hearing.

20 In doing so, of course, I will necessarily have
21 reviewed for trial purposes *Brady* disclosures, and so I'll handle
22 that at -- I'll discuss that with the parties as necessary at the
23 August 30th hearing. In other words, I'll review -- I'll decide
24 well in advance of the hearing what needs to be produced, if
25 anything, to prepare for the hearing.

1 If there's something that's not necessary for the
2 hearing but will be important at trial, I'll discuss that with
3 the parties at the August 30th hearing.

4 How quickly can that be produced for in camera review?

5 MS. ZUSMAN: If I may confer.

6 (Pause in proceedings)

7 MS. ZUSMAN: Your Honor, if I may, clarification: Do
8 you want to see the 11 volumes of discovery we have produced or
9 do you just want everything internal that we haven't produced?

10 THE COURT: I don't need to see anything you've already
11 produced.

12 (Pause in proceedings)

13 MS. ZUSMAN: Your Honor, we believe we can put that
14 together in a week.

15 THE COURT: All right. That'll be fine. And I'll get
16 an answer as soon after that as I can.

17 The parties have generally briefed the August 30th
18 motions already. You have today and may have other authorities
19 you want me to consider. Please do that by letter brief well in
20 advance of the hearing so I can, you know, assimilate what you
21 want me to understand.

22 There are two things that I -- well, one thing that I
23 will certainly focus on at the hearing, which I tried to start
24 doing today. I'll want to understand what you intend the test is
25 for the motion that you're bringing, whose burden is it and whose

1 got to satisfy what test. So don't just jump right in to the
2 facts without getting the methodology down.

3 And then second, it's been phrased as a bimodal
4 question, dismissal or not, but, of course, for a variety of
5 these motions, there are other remedies that the case law
6 discusses, and I want you to be prepared to discuss those,
7 permissive and mandatory inference instructions, for example,
8 which is what at least the Arizona court did in *Youngblood*
9 itself, you know. Now, that's not to say the Supreme Court
10 affirmed that, but that's not an uncommon remedy, so I want to
11 look at those as well.

12 Anything further, then, from the movant today, for the
13 defense?

14 MS. HOWES: Your Honor, the other request we had of the
15 Court was to allow the defense to take the testimony of
16 Department employees at the motion to dismiss hearing. We have
17 provided the government with a Touhy letter under the applicable
18 CFR, and have been informed that the government objects to our
19 taking the testimony of any Department employees.

20 I would suggest if --

21 THE COURT: Who were you thinking of?

22 MS. HOWES: We wanted to take the testimony of former
23 AUSA Jennifer Martin, AUSA Tom -- Thomas Ratcliffe, and the two
24 TFOs who were involved in the investigation, Angela Hollan and
25 Yonsoo Lee.

1 It may be that with the production of materials after
2 the Court's in camera review, we can narrow that request or be
3 more specific in that request, and it may make sense to punt that
4 issue to a later time, but that is something that is on our
5 plate.

6 THE COURT: We'll just take that up on the day of.
7 There's a method for resolving questions about Touhy litigation,
8 and we'll just do it on that day.

9 Anything further for the United States?

10 MS. ZUSMAN: No, Your Honor.

11 THE COURT: Thank you. We'll be in recess.

12 (Proceedings concluded at 11:34 a.m.)

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C E R T I F I C A T E

I certify, by signing below, that the foregoing is a true and correct transcript of the record, taken by stenographic means, of the proceedings in the above-entitled cause.

A transcript without an original signature, conformed signature, or digitally-signed signature is not certified.

DATED this 26th day of July, 2021.

/s/ Kellie M. Humiston

Kellie M. Humiston, RMR, CRR
Official Court Reporter
Certificates Expire: 9/2021